IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 269 of 1983

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

TAX RECOVERY OFFICER

Versus

CHHELAKHAN HAYATKHAN

Appearance:

1. Second Appeal No. 269 of 1983

MR BB NAIK for Appellants.

MR GIRISH D BHATT for Respondent No. 1 (since deceased) representing legal heirs and representatives of the deceased respondent No.1)

CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 23/12/2004

ORAL JUDGEMENT

1. Instant appeal filed under Section 100 of the

Code of Civil Procedure ('the Code' for short) is directed against the judgment and decree dated 16.7.1982 rendered in Regular Civil Appeal No.186 of 1980 by the learned Extra Assistant Judge, Mehsana by which the appeal filed by the present appellants came to be dismissed with costs and thereby the judgment and decree dated 29.2.1980 rendered in Regular Civil Suit No.288 of 1974 by the learned Joint Civil Judge (S.D.)., Mehsana decreeing the suit filed by original plaintiff/ deceased Chhelakhan Hayatkhan in terms of the prayers made in the suit has been affirmed.

2. This appeal was admitted vide order dated 5.9.1983 for deciding the following substantial questions of law:

(1) Whether the jurisdiction of the Civil Court to inquire into the questions raised in the suit was ousted by virtue of Section 78 of the Estate Duty Act 1953?

(2) Whether the suit was barred under Article 100 of the Limitation Act, 1963?

3. The appellants were the original defendants whereas deceased Chhelakhan Hayatkhan, who died during the pendency of the appeal and whose heirs and legal representatives have been brought on the record, was the original plaintiff. The parties are, therefore, hereinafter in this judgment referred to as 'deceased plaintiff' and 'the defendants' for the sake of convenience and brevity.

4. The facts which have given rise to the present appeal, in brief, are summarised as under:

4.1. Deceased plaintiff was the real brother-in-law of one Naththekhan Mirkhan who died on 19.4.1973. One Hanifkhan, son of said Naththekhan Mirkhan, filed the return for estimation of the estate duty of the account showing the principal value of the estate of deceased Naththekhan and during the course of the assessment proceedings, defendant No.2 held that deceased Naththekhan had constructed the suit properties being S.No. 3/725/A and 3/725/B in Benami name of deceased plaintiff and defendant No.2 also held that deceased plaintiff was not in a position to purchase the land and to spend for the construction of the said property. The said order was passed by defendant No.2 on 26.2.1970 and it was on the record produced vide Ex.28. Thereafter the Appellate Controller of Estate Duty of Western Zone

confirmed the said order of defendant No.2 on 29.9.1972 and that order was produced on record vide Ex.37. Thereafter, defendant No.3 passed an order for the attachment of the suit property being Survey No. 3/725/A on 10.7.1973. Thereafter the deceased plaintiff challenged the above orders passed by defendant No.3 on the ground that he was the absolute and sole owner of the property bearing Survey No.3/725/B situated in Chavda Vas in Mehsana. It was alleged that the said property stood in the name of the deceased plaintiff in City Survey and Municipal records and deceased Naththekhan Mirkhan had nothing to do with the suit property and had no right, title or interest in the suit property. It was further contended that defendant No.2 had wrongly held that the deceased plaintiff was not the owner of the suit property and was not in a position to purchase the land or spend for the construction of the said properties. It was also alleged that defendant No.2 was not the proper and competent authority to decide the question of the ownership of the property. It was further alleged that the deceased plaintiff was not a Benamidar of deceased Neththekhan in respect of the suit property. It was further alleged that the deceased plaintiff resided in Ahmedabad and Naththekhan and his family used to reside at Mehsana after the construction of the suit property. It was vacant and Hanifkhan Neththekhan was permitted to reside in the said property as tenant. It was further alleged that the above orders passed by the defendants were illegal, without jurisdiction and against the principles of natural justice and were not binding to the deceased plaintiff. Thereafter the deceased plaintiff served the defendants with necessary notice stating that the property of the deceased plaintiff was not liable for attachment for dues of the heirs of Naththekhan but the defendants continued to go ahead with their orders. The deceased plaintiff, therefore, filed Regular Civil suit No.288 of 1974 in the Court of learned Civil Judge (S.D.)., Mehsana for declaration to the effect that the the orders dated 26.2.1970 and 29.9.1972 are illegal, without jurisdiction, ultra vires, unjust, improper and bad in law and for a further declaration to the effect that as the deceased plaintiff being absolute owner of the suit property, attachment of the said property made by defendant No.3 was illegal, ultra-vires and without jurisdiction and also prayed for a perpetual injunction restraining the defendants from taking any action against the property of the deceased plaintiff for tax liability of legal heirs of deceased Naththekhan Mirkhan and other consequential reliefs.

4.2. The suit was contested by the defendants by

filing written statement at Ex.26 wherein inter-alia it was contended that the averments made in the plaint were wrong and the suit of the deceased plaintiff was not tenable in law. It was further contended that the suit of the plaintiff was barred by limitation. It was denied that the deceased plaintiff was an absolute and sole owner of the suit houses bearing Survey No.3/725/A and 3/725/B. It was contended that the deceased plaintiff was never in possession of the suit properties. It was also denied that deceased Neththekhan Mirkhan had nothing to do with the suit properties and that he had no right, title or interest in the suit properties. It was admitted that Naththekhan Mirkhan expired on 18.4.1963 and thereafter his son Hanifkhan filed the estate duty account showing the value of the estate of Naththekhan. It was denied that defendant No.2 wrongly held that deceased Naththekhan had constructed the houses in the Benami of the deceased plaintiff and that the deceased plaintiff was not in a position to purchase the land and to spend for the construction of the suit properties. It was also denied that the findings of defendant No.2 were arbitrary, illegal, without jurisdiction and against the principles of natural justice. It was further denied that defendant No.2 was not a proper and competent authority to decide the question of the ownership of the properties. It was contended that defendant No.2 was invested with the powers under the law to decide the question of ownership of a property in assessment proceedings and that the findings given by defendant No.2 with regard to Benami nature of the suit properties was final and conclusive, as far as such proceedings were concerned and they cannot be challenged in Civil Court. It was contended that Civil Court had no jurisdiction to hear the suit and to decided validity or legality of the findings regarding the Benami nature of the properties.

It was further denied that the deceased plaintiff had right, title or interest in the suit property as he had spent nothing for the purchase of the land or for the construction of the suit properties. It was denied that the heirs of deceased Naththekhan who resided in the suit properties were the tenants of the deceased plaintiff. It was contended that the suit property bearing S.No. 3/725/A which was attached was not of the ownership and possession of the deceased plaintiff as it was of the ownership and possession of deceased Naththekhan and after his death, the heirs of deceased Naththekhan. It was further contended that no notice was required to be given to the deceased plaintiff for the attachment proceedings as he was never a real owner of the suit properties. It was denied that the orders passed by the

defendants were illegal, ultra vires and without jurisdiction and against the principles of natural justice and equity. It was further contended that the notice given by the plaintiff under Section 80 of the Code was not legal, valid and not properly served to the defendants and hence the suit was not tenable in law. It was further contended that the present suit filed after one year from 26.2.1970, 29.9.1972 and 25.6.1973 which were the dates of passing the orders by defendant No.2 and by the appellate controller and by defendant No.3 respectively and hence the suit was barred by limitation. It was further contended that the Civil Court had no jurisdiction to decide the dispute in the instant case. It was further contended the suit was not properly valued for the purpose of Court fees, jurisdiction, etc. It was further contended that the heirs of deceased Naththekhan were necessary and proper parties in the suit and the present suit was not tenable without joining them as parties. It was further contended that the deceased plaintiff was a mill worker and was getting a pay of Rs.200/- per month and he resided permanently at Ahmedabad and he was not able to purchase the land and construct the suit houses. It was further contended deceased Naththekhan purchased the land of the suit houses in the name of the deceased plaintiff as he was his brother-in-law and the suit houses were constructed by deceased Naththekhan with his own money spending more than Rs.40,000 in the year 1962. It was further contended that in the property No.3/725/B widow of deceased Naththekhan named Harima and her minor son resided and in another property another widow of deceased Naththekhan and his won Hanif resided. It was further contended that the widow Harima and her minor son filed Regular Civil Suit No.141 of 1971 against the other widow Bai Rasulabai and her son and the deceased plaintiff and other persons for the administration of deceased Naththekhan's properties and in that suit defendant No.1 and Income tax Department were joined as the defendants and in that suit these properties were shown as properties of deceased Naththekhan. It was thereafter contended that the deceased plaintiff filed false suit in collusion with Hanifkhan with the ulterior motive not to pay the Government taxes. It was therefore prayed that the suit of the plaintiff be dismissed with costs.

4.3. The learned trial Judge framed as many as eight issues at Ex.27; recorded oral evidence of the deceased plaintiff and considered oral as well as documentary evidence on record. On appreciation, evaluation and critical analysis of the evidence on record, the learned trial Judge had held that the orders dated 26.2.1970 and

29.9.1972 holding the deceased plaintiff as Benamidar of deceased Naththekhan in respect of properties bearing S.Nos.3/725/A and 3/725/B of deceased Naththekhan Mirkhan were illegal, without jurisdiction, ultra vires, unjust, improper, bad in law and beyond authority; the attachment of S.No.3/725/A by defendant No.3 was illegal, ultra vires and without jurisdiction; the suit was time barred; Civil Court had jurisdiction to try the suit and the suit notice under section 80 of the Code was legal and valid. On the basis of the aforesaid findings, the learned trial judge decreed the suit as prayed for in terms of the prayers made in the suit.

4.4. Aggrieved by the judgment and decree passed by the learned trial Judge, the defendants carried the matter in appeal by filing Regular Civil Appeal No.186 of 1980 in the District Court of Mehsana. The learned Extra Assistant Judge, Mehsana, on reappreciation, reevaluation and reanalysis of the evidence on record and after considering the submissions advanced by the learned advocates appearing for the parties, came to the conclusion that the deceased plaintiff had established that he was the sole and absolute owner of the suit properties; the orders passed by defendant No.2 and attachment notice issued by defendant No.3 were illegal, without jurisdiction and against the principles of natural justice and not binding to the plaintiff; Civil Court had jurisdiction to try the suit; the suit was not barred by limitation and resultantly he dismissed the appeal and confirmed the judgment and decree which was impugned before him which has given rise to this Second Appeal at the instance of the defendants on the substantial questions of law to which reference is made earlier.

5. Mr. BB Naik, learned advocate of the defendants, has contended that Civil Court had no jurisdiction to try the suit in view of the bar contained under Section 78 of the Estate Duty Act, 1953 ('the Act' for short). He has also emphasised that the suit was governed by the provisions of Article 100 of the Limitation Act, 1963 and therefore the suit was barred by limitation. These two substantial questions of law, according to him, are required to be considered on the basis of the voluminous evidence on record and the statutory provisions contained in the Act as well as the Limitation Act and the two questions formulated by this Court are required to be decided in favour of the defendants. He has also taken this Court through the evidence on record and has contended that both the judgments and decrees passed by the trial court as well as the learned Extra Assistant

Judge, Mehsana are required to be quashed and set aside by allowing this appeal. He, therefore, urged to allow this appeal.

6. In counter submission, Mr. GD Bhatt, learned advocate of the heirs and legal representatives of the deceased plaintiff, has contended that there is no illegality committed by the trial court in passing the decree which has been affirmed by the learned Extra Assistant Judge in appeal. According to him, question of title cannot be decided by Estate Duty Controller but it has to be decided by the Civil Court as Civil Court is competent to decide it as per Section 9 of the Code. It is asserted by him that there is no bar under Section 78 of the Act. It is clear from the said Section that no suit shall be brought in any Civil Court to set aside or modify any estate duty determined under this Act and no prosecution, suit or other proceedings shall lie against the Government or any officer of Government for anything in good faith done or intended to be done under this Act. In the instant case, there is no such question. The question was with regard to declaration of the title of the suit properties and, therefore, the learned Civil Judge very rightly held that there was no bar under Section 78 of the Act. It is also emphasised by him, that provisions of Article 100 of the Limitation Act cannot be invoked. According to him, Article 113 of the Limitation Act would be applicable to instant case and as per Article 113 of the Limitation Act, any suit for which no period of limitation is provided elsewhere in that Schedule, the period of limitation is three years from the date of accrual of the cause of action. He, therefore, urged that the substantial questions of law formulated by this Court are required to be answered in the negative, that is, against the defendants and in favour of the deceased plaintiff. According to him, there is no substance in the appeal. He, therefore, urged to dismiss the appeal.

7. This Court has considered the submissions advanced by the learned advocates appearing for the parties; perused the judgments and decrees recorded by both the courts below, the set of evidence, record and proceedings and the statutory provisions contained under the Act, Limitation Act and the Code.

8. It transpires from the record that the concerned authority under the Act found that the suit properties were properties of deceased Naththekhan Mirkhan and that the deceased plaintiff was Benamidar of said Naththekhan Mirkhan and the said properties were liable for payment

of estate duty inasmuch as it belonged to deceased Naththekhan Mirkhan. It transpires from the record and proceedings of the matter that the matter was carried by way of appeal under the Act before the Appellate Tribunal but by that time the deceased plaintiff had already filed the suit being Regular Civil Suit No.288/1974. The Appellate Tribunal partly allowed the said appeal and found that the impugned order of the appellate authority confirming the inclusion of the suit properties in the dutiable estate of deceased Naththekhan Mirkhan was liable to be set aside and was accordingly set aside and the said order of the Appellate Tribunal is on record at Ex.44. It may be noted that in appeal bearing No.I.T.A.No.363(Ahd)/75-76 the Appellate Tribunal by judgment and order dated 27.2.1979 observed that controversy was whether the building of the value of RS.65,000 belonged to late Naththekhan Mirkhan or Chhelakhan Hayatkhan and the contention of the assessee was that the properties in question belonged to Chhelakhan Hayatkhan and, therefore, no question of addition of RS.65,000 on account of that unexplained investment arose and the said appeal before the Tribunal came to be disposed of by quashing and setting aside the impugned order of addition of RS.65,000/- with a further direction to the Assistant Controller of Estate Duty to pass fresh order after making available a copy of the order passed in Civil Suit No.288 of 1974.

9. In the aforesaid backdrop of the facts, now let us examine the substantial questions of law formulated by this Court in this Second Appeal.

10. So far as the first substantial question of law formulated by this Court as to whether the jurisdiction of the Civil Court to inquire into the questions raised in the suit was ousted by virtue of Section 78 of the Act is concerned, it is seen that Section 78 of the Act stipulates that no suit shall be brought in any Civil Court to set aside or modify any estate duty determined under this Act and no prosecution, suit or other proceedings shall lie against the Government or any officer of Government for anything in good faith done or intended to be done under this Act. According to this Court, Section 78 of the Act cannot be invoked as the deceased plaintiff had filed suit for declaration to the effect that both the orders dated 29.9.1972 and 27.2.1979 produced at Exs.37 and 44 respectively were illegal, unjust, ultra vires as by virtue of the said orders, it was held by the Department that the deceased plaintiff was a Benami of deceased Naththekhan Mirkhan in respect of properties Nos.3/725/A and 3/725/B of Mehsana.

Therefore, the suit was filed for a declaratory relief. In aforesaid view of the matter, according to this Court, bar contained in Section 78 of the Act cannot be invoked and both the courts below have rightly held that the jurisdiction of the Civil Court to inquire into the questions raised in the suit was not outset by virtue of Section 78 of the Act.

11. The second substantial question of law which is formulated by this Court is whether the suit was barred under Article 100 of the Limitation Act, 1963. As per the contentions advanced by the learned advocates appearing for the parties, this Court has to decide as to which Article of the Limitation Act could be invoked in the facts and circumstances of the case.

12. As per the provisions of Article 100 of the Limitation Act, the suit is required to be filed within a period of one year from the date of the order of the concerned officer. Now in the instant case, it was very clear that the first order was passed on 26.2.1970 and the second order was passed on 29.9.1972. It was also clear from the record that notice was issued on 25.3.1973 and the suit was filed on 5.9.1974. The deceased plaintiff had mainly challenged the orders dated 26.2.1970 and 29.9.1972 passed by the defendants and if Article 100 of the Limitation Act was applicable, the suit was not within the time. According to this Court, if the validity of the order passed by the Government official was questioned, provisions of Article 100 of the Limitation Act do not apply as it would fall under the purview of Article 113 of the Limitation Act and as per the said Article, period of limitation is three years from the date of accrual of the cause of action. In instant case, the deceased plaintiff filed the suit against the attachment notice for the sale proclamation which was issued as per Ex.33 and notice dated 22.8.1974. So it was very clear that the deceased plaintiff was required to file suit within the period of three years. The notice at Ex.33 was dated 22.8.1974. Article 100 is applicable in respect of a suit to alter or set aside any decision or order of a Civil Court in any proceeding other than a suit or any act or order of an officer of Government in his official capacity and in such a suit the period of limitation of one year begins to run from the date of the final decision or order by the Court or the date of the act or order of the officer, as the case may be. The learned trial Judge has held that Article 100 would not be applicable as it is applicable to those cases in which the suit was filed to alter or set aside any decision or order of a Civil Court in any proceeding

other than a suit or any act or order of an officer of Government in his official capacity. The learned trial Judge has in terms held that Article 113 would be applicable which is the residuary Article and as per this Article any suit for which no period of limitation is provided elsewhere in this Schedule such suit would be governed under this Article. Hence, in instant case, the period of limitation was of three years and, therefore, the suit filed by the deceased plaintiff was in time. Therefore, it was rightly held that the suit was not covered under Section 100 of the Limitation Act and it was governed by Article 113 of the Limitation Act and the suit was within the period of limitation.

13. It may be noted that the trial court as well as the appellate court have in terms held that competent authority under the Act had not given Chhelakhan Hayatkhan - the deceased plaintiff - in whose name the suit properties stood in City Survey records as well as Municipal records as owner, an opportunity of being heard and therefore the orders under challenge in the suit were null and void and consequently the suit was within the period of limitation. On the basis of the material on record, both the courts below have concurrently found that Chhelakhan Hayatkhan who was shown as owner of the suit properties in the City Survey and Municipal records was not given an opportunity of being heard before the decision adverse to him was taken and the suit properties were treated as that of deceased Naththekhan Mirkhan without hearing Chhelakhan Hayatkhan. The suit properties were not of deceased Naththekhan Mirkhan is the finding of fact and it cannot be reagitated in Second Appeal since both the courts below have concurrently found that the suit properties were owned by Chhelakhan Mirkhan - the deceased plaintiff - and not by Naththekhan Mirkhan.

14. At the cost of repetition, be it stated that principles of natural justice were violated and the appellate Tribunal constituted under the Act in Appeal No.ITA No.363(Ahd)/75-76 by judgment and order dated 27.2.1979 observed that controversy was whether the building of the value of Rs.65,000 belonged to late Naththekhan Mirkhan or Chhelakhan Hayatkhan. It was also observed in the said judgment that it would be appropriate to set aside the order of Assistant Commissioner and to direct the appellate Assistant Commissioner to dispose of the appeal before him in accordance with law after the suit was disposed of.

15. It is a settled principle of law that concurrent

finding of fact record by both the courts below cannot be assailed in a second appeal while exercising the powers under Section 100 of the Code. I am fortified in my above view by the judgment of the Honourable Apex Court in the case of Karnataka Board of Wakf v. Anjuman-E-Ismail Madris-Un-Niswan, (1999) 6 SCC 343, wherein the Honourable Supreme Court has observed that concurrent findings of fact cannot be assailed in second appeal. In the case of Panchugopal Barua & Ors v. Umesh Chandra Goswami & Ors, JT 1997 (2) S.C. 554, the Honourable Apex Court has held that substantial question of law is sine-qua-non for exercise of jurisdiction under Section 100 of the Code. It was further held that generally speaking, an appellant is not to be allowed to set up a new case in second appeal or raise a new issue (otherwise than a jurisdictional one), not supported by the pleadings or evidence on the record and unless the appeal involves a substantial question of law, a second appeal shall not lie to the High Court under the amended provisions.

16. Seen in the above context, both the substantial questions of law formulated by this Court are answered in the negative i.e., against the defendants and in favour of the deceased plaintiff. It is held that the jurisdiction of the Civil Court to inquire into the the questions raised in the suit was not ousted by virtue of Section 78 of the Act and it is also held that the suit was not bared by Article 100 of the Limitation Act.

17. No other point is raised by the learned advocates appearing for the parties in this Second Appeal.

18. In aforesaid view of the matter, this court is in complete agreement with the judgment and decree passed by the learned trial Judge which is affirmed by the learned first Appellate Court and the said judgment and decree cannot be termed as illegal, or against the evidence on record. No other conclusion was possible except the one reached by the learned trial Judge and affirmed by the first appellate Judge. Therefore, this appeal lacks merit and deserves to be dismissed.

19. For the foregoing reasons, the appeal fails and is accordingly dismissed. No order as to costs.

(A.M. Kapadia, J.)

(karan)